



SUPREME COURT, U. S.

FILED

OCT 24 1967

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 158

FLEMING SMITH,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI OF THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PETITIONER'S REPLY BRIEF

The respondent argues that the "informer's privilege" is necessary to law enforcement; that there should be a "Balancing of Rights" theory adopted in determining this case. (Br. 3-7)

We have no quarrel with such a procedure. But let us not forget what is being balanced: the "informer's privilege" against the need for a truthful verdict. *McCray v. Illinois*, 386 U.S., at p. 307.

Similar policy arguments seeking to expand the "informant's privilege" to material witnesses on the issue of guilt in narcotics cases were emphatically rejected by the Pennsylvania Supreme Court on September 26, 1967. *Commonwealth v. Carter*, — Pa. —, 2 CrL 3001.

Respondent says that they have fully complied with the requirements of *Roviaro v. United States*, 353 U.S. 53, by producing the informant in open court to let the petitioner gaze at him. (Br. 10). Our main reply to such an argument is that if the State fully complies with the requirements of *Roviaro*, there simply is no privilege to invoke. Secondly we reply, there is a distinction between producing a witness and disclosing the witness's identity. 8 Wigmore, Evidence #2374 (4); Cf. *Brookhart v. Janis*, 384 U.S. 1.

Respondent argues that in any event the defense counsel made the statement that he knew the informant and had represented him on a previous occasion. (Br. 10) We reply that it cannot be assumed from such statement that defense counsel knew the witness's correct name. Moreover, there is no finding of fact by the trial judge that defense counsel knew the witness's correct name. (*Roviaro v. United States*, 353 U.S. 53, footnote 8.)

Respondent stresses the obvious when he argues that *Pointer v. Texas*, 380 U.S. 400, did not discuss the scope of cross-examination. (Br. 11) Of course it didn't, but it supplied the basic postulate which permitted us to look to *Alford v. United States*, 282 U.S. 637, as authority for the proposition that cross-examination was denied in the case at bar.

Respondent answers that *Alford* has no application at bar because the objection to the question seeking the wit-

ness's correct address was on the ground of relevancy. (Br. 11) But, we reply, *Alford* held that "the question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed." That is why we argued that *Alford* makes the case at bar *a fortiori*. Without a witness's correct name, not only is inquiry into the witness's reputation foreclosed, but so are other, more basic, avenues of inquiry and attack on his credibility, including any history of mental illness, the full extent of his criminal record, and the number of charges pending against him.

Alford held that there is no obligation on a trial judge "to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked."

That statement must have derailed the respondent. Respondent's approach to the case at bar is predicated upon the faulty major premise that the self-incrimination clause of the Fifth Amendment should control the decision, citing *United States v. Cardillo*, 316 F. 2d 606. (Br. 8-11)

We reply that the protections of the Fifth Amendment were not invoked in the instant case; it does not involve one constitutional right opposed to another; it simply involves a state testimonial privilege improperly invoked in derogation of petitioner's constitutional right of confrontation. Moreover, not even the Fifth Amendment per-

mits a witness to withhold his correct name. *United States v. Compton*, 365 F. 2d 1.

Conclusion

Petitioner reiterates his prayer for reversal.

Respectfully submitted,

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